Served: April 7, 1992

NTSB Order No. EA-3525

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of March, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

ALLAN RAMAGE SWEENY,

Respondent.

OPINION AND ORDER

The Administrator has appealed from an oral initial decision that Administrative Law Judge Thomas W. Reilly rendered at the conclusion of an evidentiary hearing held December 16, 1988.[1] The law judge reversed an order the Administrator had issued April 28, 1988, suspending respondent's airline transport pilot (ATP) certificate for 30 days alleging that, with respect to a February 26, 1987, flight he operated as pilot-in-command for Florida Express,

[1]A copy of the initial decision, an excerpt from the transcript, is attached.

Inc., respondent failed to log an altimeter discrepancy at the next point of landing after the discrepancy was discovered, that he subsequently operated a flight in the aircraft when it was unairworthy because of the discrepancy, and that these actions were careless.[2] The Administrator appeals the law judge's dismissal of the section 91.29 and 121.563 charges and requests that the matter be remanded for further findings on the issue of the aircraft's airworthiness. After reviewing the evidence of record, and in light of Board precedent, the Board agrees that respondent violated FAR section 121.563, and that the Administrator presented a prima facie case that a violation of section 91.29 was committed. We will, therefore, reverse the initial decision's dismissal of the former charge and remand for

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[2]The Administrator charged respondent with violations of Sections 91.9, 91.29(a), and 121.563 of the Federal Aviation Regulations (FAR). These sections at the relevant time read as follows:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

"§ 91.29 Civil aircraft airworthiness.

(a) No person may operate a civil aircraft unless it is in an airworthy condition."

"§ 121.563 Reporting mechanical irregularities.

The pilot-in-command shall ensure that all mechanical irregularities occurring during flight time are entered in the maintenance log of the airplane at the end of flight time. Before each flight the pilot in command shall ascertain the status of each irregularity entered in the log at the end of the preceding flight."

further hearing on the section 91.29 charge.

Briefly stated, the facts are these: Respondent, acting as pilot-in-command of a Florida Express scheduled passenger carrying operation in a BAC 1-11 (Model 400) aircraft, detected what he subsequently reported was a 600 foot discrepancy between his altimeter and the altimeter on the first officer's panel upon reaching a cruising altitude of 29,000 feet on an Orlando, Florida - Cincinnati, Ohio flight. The BAC 1-11, Model 400, has a third altimeter, and the carrier's Minimum Equipment List (MEL) permits operation with two altimeters. Respondent descended to 12,000 feet for the remainder of the trip (at that altitude, the spread disappeared), and upon landing, contacted Florida Express dispatch and maintenance to discuss the discrepancy. Since the MEL required only two altimeters, respondent turned the Captain's altimeter to standby,[3] and, on the advice of dispatch and maintenance, began the return trip to Orlando. The trip was completed uneventfully and, at its termination, respondent logged the discrepancy that had occurred at 29,000 feet on the first leg. Evaluation by maintenance established that the altimeters met manufacturer's specifications.

The Administrator argues that the law judge's reliance on Administrator v. Leighton, 3 NTSB 413 (1977), for the proposition that respondent could wait until after the return

[3]Respondent related that, with the altimeter in the standby mode, all altimeters agreed.

flight to log the altimeter discrepancy, was misplaced because that case was effectively overruled by Administrator v. Heisner and Diaz, NTSB Order EA-2846 (1988), in which the Board acknowledged an amendment to section 121.563 to require such a logging at the next place of landing. See 45 FR 41586 (1980). Since respondent failed to log the altimeter discrepancy upon landing at Cincinnati, we agree with the Administrator that he violated FAR section 121.563.

The Administrator further argues that the law judge's determination that the aircraft was not unairworthy is erroneous, citing Administrator v. Doppes, Order EA-2123 (1985).[4] The law judge found that the altimeters on the plane were within manufacturer's tolerances; however, the Captain's altimeter was connected to a Static Defect Correction Module (SDCM), and, when in the normal mode, the altimeter was apparently being overcorrected by that module. Nevertheless, when placed in the standby mode, the altimeter received its input directly from the normal static pressure sources and

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[4]In Doppes, the Board stated as follows:

> "The term "airworthiness" is best defined by reference to Section 603(c) of the Federal Aviation Act of 1958 (49 U.S.C. 1423(c)) which imposes a two-prong definition. In order to be airworthy, an aircraft (1) must conform to its type certificate, if and as that certificate has been modified by supplemental type certificates and by Airworthiness Directives; and (2) must be in condition for safe operation. The term "airworthiness" is not synonymous with flyability, and, once an aircraft has been rendered unairworthy because of damage or major modification (see FAR Part 1), it must be repaired and returned to service by means of an established protocol (See FAR Part 43)."

its readings were normal. (Exh.R-6).

A remand on the matter of airworthiness is necessary because a sound judgment on the aircraft's airworthiness is not possible without greater record development on the precise cause or source of the altimeter discrepancy. Absent more information on the nature of the problem that, at the very least, manifested itself in the readout of the respondent's altimeter, we cannot with confidence find that the aircraft was both safe to fly and in conformity with its type certificate.[5]

In the Board's view, the evidence establishes that the discrepancy between the two altimeters was not minimal,[6] and as the Administrator points out, the cause of the altimeter problem was still in doubt when the second takeoff was made.[7]

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[5]The respondent maintains that the record is fully developed for purposes of ruling on the section 91.29 charge.

[6]The maximum allowable discrepancy at 29,000 ft. is 360 ft.

[7]Although the air carrier's Minimum Equipment List (MEL) (Exh. R-3) permits one altimeter to be inoperative provided there are three altimeters installed and altitude information is available to each pilot, the evidence here reveals that the pilots were not sure, until after the second takeoff, which altimeter was malfunctioning. A valid deferral under the MEL thus could not be accomplished.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted in part;[8]

2. The initial decision's dismissal of the section 121.563 charge is reversed; and

3. The matter is remanded for further proceedings.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[8]Respondent's motion for oral argument is denied as it presents issues that are either adequately addressed in the pleadings or which should have been addressed in a cross appeal.